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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

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O. L. McCOTTER, Director,
Texas Department of Corrections,

Petitioner,

v.

JESSIE RAY JONES,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

HENRY WADE
Criminal District Attorney
Dallas County, Texas

RUTH E. PLAGENHOEF
Assistant District Attorney
Appellate Section

SUE L. LAGARDE
Chief Felony Prosecutor
Counsel of Record

Dallas County District Attorney
Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202-4606
214-749-8903

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

I.

Should this Court's decision in *Estelle v. Smith*, 451 U.S. 454, be retroactively applied to overturn convictions final before the date of that decision?

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In The

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O. L. McCOTTER, Director,
Texas Department of Corrections,

Petitioner,

v.

JESSIE RAY JONES,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 18, 1985.

—o—

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, appears in the Appendix as *Jones v. McCotter,* No. 84-1401 (5th Cir. July 18, 1985).

JURISDICTION

The judgment of the United States Court of Appeals setting aside Respondent's capital murder conviction was entered on July 18, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all crimial prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

———o———

STATEMENT OF THE CASE

On January 15, 1974, Jessie Ray Jones murdered William Cain in a convenience store robbery. At the punishment phase of the capital murder proceeding the State presented testimony of two psychiatrists who had examined Jones twice before trial. The psychiatrists testified that Jones would be dangerous in the future. After hearing evidence that Jones had been previously convicted of aggravated assault with a deadly weapon, auto theft, theft, burglary, assault with a prohibited weapon, and robbery by firearm, the jury determined there was a probability that Jones would be dangerous in the future. TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1981). Jones was sentenced to death.

Jones' conviction was affirmed in *Jones v. State,* 568 S.W.2d 847 (Tex. Crim. App. 1978) (en banc) and his petition for writ of certiorari was denied by this Court in *Jones v. Texas,* 439 U.S. 959, 99 S.Ct. 363 (1978).

On March 7, 1979, the Texas Court of Criminal Appeals denied a state application for writ of habeas corpus without written order in Writ No. 7827.

Jones filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Texas, Dallas Division, Cause No. CA3-79-0146-H. A United States Magistrate made findings, conclusions and a recommendation to deny relief on March 12, 1984. Appendix, p. 1a. These were adopted by the District Judge on April 11, 1984. Appendix, p. 6a. The court found that the trial judge had ordered the psychiatrists to exclude any testimony relating unwarned statements made during the interviews or any testimony based on those statements, and that the testimony consisted of opinions

based on Jones' prior criminal records and the psychiatrists' observations. Thus, the court held, to the extent that Jones' actions and demeanor were communicative acts, they were not testimonial in nature and were not protected by the Fifth Amendment.

Jones appealed the district court decision to the United States Court of Appeals for the Fifth Circuit in Cause No. 84-1401. The Texas Attorney General abandoned the argument that the psychiatric testimony was based on non-testimonial communications, and argued that *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) should not be applied retroactively.

The United States Court of Appeals for the Fifth Circuit noted that it had rejected that contention in *Muniz v. Procunier,* 760 F.2d 588 (5th Cir. 1985), *petition for cert. filed sub nom. McCotter v. Muniz* (July 25, 1985) (No. 85-151) and that the Texas Court of Criminal Appeals had also rejected that contention in *Ex parte Chambers,* 688 S.W.2d 484 (Tex. Crim. App. 1984), *petition for cert. filed,* 53 U.S.L.W. 3854 (June 4, 1985).[1] The court held that Jones' Fifth Amendment rights were violated under *Estelle v. Smith,* and granted relief. *Jones v. McCotter,* No. 84-1401 (5th Cir., July 18, 1985). Appendix, p. 11a.

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[1] This same ground for review has been presented to this Court in these petitions for certiorari.

—o—

REASONS FOR GRANTING THE WRIT

I.

This Court has never decided whether Estelle v. Smith should be prospectively or retroactively applied. The decision of this Court in Solem v. Stumes compels only prospective application of Estelle v. Smith. The action of the United States Court of Appeals for the Fifth Circuit applying Estelle v. Smith retroactively is erroneous and should be reviewed.

Petitioner believes that the decision of this Court in *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), should not, in light of this Court's decision in *Solem v. Stumes,* 465 U.S. —, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) be applied retroactively to cases in which a conviction is being collaterally attacked. In *Stumes* it was held that this Court's decision in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should not be applied retroactively. *Edwards* held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him since an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. In *Estelle v. Smith,* another Fifth Amendment decision, the Court held that where a defendant was not advised before a pre-trial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at the sentencing proceeding, the admission of the psychiatrist's testimony at that proceeding violated the defendant's Fifth Amendment privilege against compelled self-incrimination. The Court further held that admission of the psychiatrist's testimony violated the defendant's Sixth Amendment right to the assistance of counsel in deciding whether to submit to the examination and to what end the

psychiatrist's findings could be employed. The *Edwards* and *Estelle v. Smith* decisions thus implicate similar constitutional rights.

The analysis of this Court in *Stumes* should be used to determine whether *Estelle v. Smith* is retroactive. *Stumes* held that the criteria guiding resolution of whether a new constitutional decision should be applied retroactively are 1) the purpose to be served by the new standards, 2) the extent law enforcement authorities relied on the old standards, and 3) the effect on the administration of justice of a retroactive application of the new standards. The *Stumes* analysis, when applied to *Estelle v. Smith,* compels non-retroactive application with even greater force than in *Edwards.*

Purpose of new standard

"Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Stumes,* 104 S.Ct. at 1342. In *Stumes* the Court noted that the "*Edwards* rule has only a tangential relation to truth finding at the trial." The request for a lawyer by an accused does not mean that his subsequent statements are likely to be inaccurate.

Similarly, the fact that an accused was not warned by the examining psychiatrist that his statements might be used to prove future dangerousness does not make those statements any less accurate.

Miranda itself was not applied retroactively to trials taking place before it was decided. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 2602, 16 L.Ed.2d 694 (1966). *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Whether a constitutional rule of criminal procedure enhances the reliability of the fact finding process at trial is a matter of degree. In *Stumes* and *Johnson* it

was noted that pre-*Miranda* law would still protect an accused from being convicted by use of coerced confessions. If statements made to a psychiatrist are coerced, the same protections should be available.

Miranda can be no less important to enhancing accuracy than *Estelle v. Smith,* and *Miranda* is not retroactive. Since *Estelle v. Smith* flows from *Miranda* it can also be regarded as "a prophylactic rule, designed to implement pre-existing rights" and should not be applied retroactively. *Stumes* 104 S.Ct. at 1343. *Stoval v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

Extent of reliance

In *Stumes* it was held that *Edwards* "established a bright-line rule to safeguard pre-existing rights, not a new substantive requirement" in that *Edwards* "did not overrule any prior decision or transform standard practice." Nevertheless, sufficient reliance was found to "consider the reliance interest compelling."

Similar analysis reveals that *Estelle v. Smith* was at least such a "newish"[2] decision. Prior to *Estelle v. Smith* it was accepted that punishment phase psychiatric testimony offering no threat of disclosure of prosecutable crimes involved no compelled testimonial self-incrimination. *Hollis v. Smith,* 572 F.2d 685, 690-691 (2d Cir. 1978); *Livingston v. State,* 542 S.W.2d 660 (Tex. Crim. App.

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2 *Shea* v. *Louisiana,* 470 U.S. —, 106 S.Ct. —, 84 L.Ed.2d 38 (February 20, 1985), Justice White, dissenting at 84 L.Ed.2d 38, 51. *Shea* held *Edwards* applicable only to cases on direct appeal at the time *Edwards* was decided. Justice White coined the distinction between "not new, newish and brand new" categories of decisions.

1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977). It has also been held that the Miranda requirement of specific warnings did not apply outside the context of "the inherently coercive custodial interrogations for which it was designed." *Roberts v. United States,* 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). Authorities justifiably relied on these and other cases and state statutes to allow punishment phase psychiatric testimony. *See Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d (1976); and TEX. CODE CRIM. PROC. ANN. art. 46.02(3)(g)(Vernon 1979), which prohibits the use of statements made during the course of the examination in the *guilt* phase of the trial, thus impliedly permitting their admission at the punishment phase of the trial.

Petitioner notes that the first Fifth Circuit opinion dealing with the retroactivity of *Estelle v. Smith* (and not appealed to this Court) erroneously held "only a decision which establishes a new principle of law need be considered for prospective application. A decision which merely restates existing law to a set of facts different from those which gave birth to the original principle is given retroactive application." *Battie v. Estelle,* 655 F.2d 692, 697, (5th Cir. 1981). The Court in *Battie* held *Estelle v. Smith* merely applied already fixed principles to a new factual situation and gave *Estelle v. Smith* retroactive effect based on that finding. Not only did the three judge panel incorrectly hold *Estelle v. Smith* not to be "new", it engaged in that analysis at the threshold of its inquiry instead of as a part of the second criteria, reliance. Thus the analysis used by the *Battie* panel was incorrect. The correct standard of analysis is found in *Stumes* and in *Stumes* the newness of a decision is simply a part of the reliance analysis. *See Shea v. Louisiana.*

The Fifth Circuit has further confused the issue by its opinion in *Muniz,* 760 F.2d 588. After noting that "the well-established Texas law" was that an interview by a psychiatrist was not testimonial or adversarial, the court insisted that in the federal constitutional sense *Estelle v. Smith* was not "new". Apparently, in the view of the Fifth Circuit, law enforcement authorities are only justified in relying on decisions of the United States Supreme Court.

Effect on administration of justice

In *Stumes* the Court held it could "only guess" at the number of cases where *Edwards* might make a difference. The effect on the administration of justice of the retroactive application of *Estelle v. Smith* however can be "guessed at" with more confidence: one Texas psychiatrist alone has testified in several hundred cases. *Smith v. Estelle,* 445 F.Supp. 647, 653 n.7 (N.D. Tex. 1977). If the Court of Criminal Appeals is allowed to apply *Estelle v. Smith* retroactively and by rote, the criminal justice system will be substantially disrupted. To incorrectly apply *Estelle v. Smith* retroactively is to put an unnecessary burden on the victim witness and the State in retrying a case, the events of which took place over 10 years ago. The burden is especially unnecessary in this particular case because the accuracy of the fact finding process is not implicated. The death sentence was amply supported by the evidence of the circumstances of the offense and of Jones' prior convictions of violent crimes.

Retroactive application of *Estelle v. Smith* "would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with pre-

viously announced constitutional standards." *Johnson v. New Jersey,* 86 S.Ct. at 1780.

Summary

The Fifth Circuit Court of Appeals has relied on the Texas Court of Criminal Appeals' decision in *Ex parte Chambers,* 688 S.W.2d 484, for support of several of its points in *Muniz,* and the case at bar. In *Chambers,* a petition has been filed. In *Chambers,* the Texas Court of Criminal Appeals may have relied on *Battie,* for its refusal to consider the issue of retroactivity. Thus the Fifth Circuit Court of Appeals and the Texas Court of Criminal Appeals have both failed to properly address the issues raised by the petitions in this case and in *Chambers.*

It is clear that the criteria reiterated in *Stumes* when applied to *Estelle v. Smith* mandate a prospective application only. At the very least, *Estelle v. Smith* should not be applied in collateral attacks on convictions in which direct appeal was exhausted long before *Estelle v. Smith* itself was decided. Since this Court has never ruled on the retroactivity of *Estelle v. Smith* it should do so now.

———o———

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY WADE
Criminal District Attorney
Dallas County
State of Texas

RUTH E. PLAGENHOEF
Assistant District Attorney
(214) 749-8906

SUE L. LAGARDE
Chief Felony Prosecutor
Counsel of Record

Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202-4606
(214) 749-8903

Dated: September, 1985

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-79-0146-H

JESSIE RAY JONES

V.

DIRECTOR, TEXAS DEPARTMENT
OF CORRECTIONS

FINDINGS, CONCLUSIONS AND
RECOMMENDATION OF THE
UNITED STATES MAGISTRATE

(Filed March 12, 1984)

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate are as follows:

FINDINGS AND CONCLUSIONS:

Petitioner, an inmate of the Texas Department of Corrections, here seeks relief pursuant to the provisions of 28 U.S.C. §2254 from a death sentence imposed upon him in 1974 by the Criminal District Court No. 3 of Dallas County, Texas following his conviction for the felony offense of capital murder in Cause No. C-74-3543-PJ. The Texas Court of Criminal Appeals affirmed the conviction in a reported decision. See *Jones v. State,* 568 SW2d 847 (1978). A certified copy of that opinion and decision has been furnished by Respondent and is a part of this record. Petitioner then sought habeas corpus relief in the State

courts pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure without success. The record reflects, and Respondent concedes, that Petitioner has exhausted his available state remedies and that this action is thus properly before this court for decision.

The facts of the case which resulted in the petitioner's conviction and death sentence are succinctly stated in the opinion by the Court of Criminal Appeals and do not require repetition here. It is sufficient to note that Petitioner was convicted for the murder of Wiliam G. Cain, a convenience store clerk, during the perpetration of an armed robbery.

In the original petition filed in this action, Petitioner alleged ten grounds of error. Following a hearing on February 16, 1984, a transcript of which has been filed as a part of this record, Petitioner filed an amended petition for habeas corpus in which he formally waived seven of his original asserted grounds and elected to pursue only his first, sixth and eighth grounds. Those grounds are as follows:

1. That the Trial Court erred in admitting psychiatric testimony in the punishment stage of the death penalty trial, gained by interviewing the petitioner for his civil competency trial, in violation of his Fifth Amendment privilege against self-incrimination, his rights to due process of law and his Sixth Amendment right to the effective assistance of counsel;

6. That the Trial Court erred in failing to grant a mistrial because of improper prosecutorial argument; and

8. That the Trial Court erred in failing to give a limiting instruction in the jury charge in the guilt/innocence

stage on the use of evidence of an extraneous offense. These grounds will be considered in reverse order.

In his eighth ground, Petitioner claims that the Trial Court failed to give a proper limiting instruction in the jury charge on the use to be made of evidence of an extraneous offense. Specifically, Petitioner complains that, in applying the applicable Texas law, the Court of Criminal Appeals held that the evidence of the extraneous offense was admissible on the issue of identity. Notwithstanding this finding by the Court of Criminal Appeals, the Petitioner complains that the charge as given to the jury instructed them that they could use the evidence of the extraneous offense if it aided them in establishing motive, scheme or design but not identity. But Petitioner is simply mistaken in his interpretation of the charge. The pertinent part appears in the second paragraph on page 96 of the transcript of papers in the State case, and it clearly shows that the court advised the jury that the purpose of the admission of the evidence was to aid the jury, if it did, in determining the identity of the person who committed the offense. And in light of the fact that Petitioner has formally waived his complaint concerning the admission of the evidence of the extraneous offense, his complaint concerning the court's charge, even if it were true, would not establish that the charge was so defective as to deprive the petitioner of any rights secured to him by the United States Constitution, and he would accordingly not be entitled to federal habeas corpus relief on such complaint. *Cupp v. Naughten,* 414 U.S. 141 (1973); *Henderson v. Kibbe,* 431 U.S. 145 (1977). Petitioner is not entitled to relief on his eighth ground.

In his sixth ground, Petitioner complains that the Trial Court erred in failing to grant a mistrial because of

improper prosecutorial argument. The argument in question appears at page 2884, Volume VIII of the Statement of Facts of the Trial. The argument complained about appears at the top of that page where the prosecutor argued, in response to a comment made by defense counsel, that "they don't pay me enough to come down here and stand in front of you people and ask you to do something that I couldn't do myself." The Trial Court promptly sustained the objection by defense counsel and instructed the jury to disregard the prosecutor's remark. But it cannot seriously be argued that such a remark, made in response to a remark by the defense counsel, was so prejudicial as to render the trial fundamentally unfair, particularly in light of the Trial Court's prompt action in directing the jury to disregard such remark. Accordingly, Petitioner is not entitled to federal babeas corpus relief. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974); *Cobb v. Wainwright,* 609 F.2d 754 (5th Cir. 1980). Petitioner is not entitled to relief on his sixth ground.

In his first ground, Petitioner complains that the Trial Court erroneously permitted the two psychiatrists to testify in the punishment stage of the trial as to his future dangerousness because the psychiatrists had examined Petitioner in connection with a civil competency hearing and that such testimony deprived the petitioner of his Fifth Amendment privilege against self-incrimination, his right to due process of law and his Sixth Amendment right to the effective assistance of counsel. Petitioner attempts to equate the facts of this case with those condemned by the Supreme Court in the case of *Estelle v. Smith,* 451 U.S. 454 (1981). But the facts of this case are clearly distinguishable. In this case, the record reflects that defense

counsel sought a sanity hearing on the ground that Petitioner was not sane, and defense counsel filed an affidavit to that effect. (Transcript, page 63). A sanity hearing was had and Petitioner was found sane and competent to stand trial. (Transcript, page 70). Prior to the testimony by the psychiatrist, defense counsel objected on the same grounds which he raises here and the Trial Court entered a detailed order which appears in Volume VIII of the Statement of Facts, pages 2777 and 2778. The court suppressed any testimony by the psychiatrists as to the contents of any conversation with Petitioner, and the court further suppressed any opinion by the psychiatrists that was based in any way on any statements made by Petitioner concerning the facts of the case. The testimony of Dr. John T. Holbrook appears in Volume VIII of the Statement of Facts at pages 2800-2823, and the testimony by Dr. James P. Grigson appears at pages 2827-2855. A review of that testimony reflects that the psychiatrists did not testify as to any facts related to them by the petitioner, nor did they base their opinion on any facts which he may have related to them. The testimony by the psychiatrists in this case is substantially equivalent to the testimony by the same two psychiatrists which was expressly approved of by the Supreme Court in the recent case of *Barefoot v. Estelle,* — U.S. —, 103 S.Ct. 3383, 3395-3400 (1983). Petitioner is not entitled to relief on his first ground.

RECOMMENDATION:

I recommend that all relief requested be denied.

SIGNED this 12th day of March, 1984.

/s/ John B. Tolle
UNITED STATE MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-79-0146-H

JESSIE RAY JONES

Petitioner

v.

DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, et al.

Respondents

MEMORANDUM OPINION AND ORDER

(Filed April 11, 1984)

The Court has made an independent review of the pleadings, files and records in this case; the Findings, Conclusions and Recommendation of the United States Magistrate, filed March 12, 1984; and Petitioner's Objections, filed March 22, 1984. The Court is of the opinion that the Findings and Conclusions of the Magistrate are correct.

Petitioner's position is that his case is identical to *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866 (1981). In Petitioner's view, *Smith* stands for the proposition that, absent a waiver of Fifth Amendment rights, a doctor may not base his psychiatric diagnosis upon the substance of words spoken during the interview of a petitioner, even if the specific words are not stated in testimony. Petitioner's interpretation is not correct. The precise holding, as to this aspect, is stated in the first and second full paragraphs of *Smith* at 101 S.Ct. 1876.

Petitioner's case differs in many material ways from *Smith*. Unlike *Smith*, Petitioner sought the psychiatric interviews for the purpose of establishing his insanity defense. Further, the psychiasrist's testimony in *Smith* was based almost entirely upon incriminating statements that Smith had made to the psychiatrist concerning the offense and his lack of remorse for his actions. *See Smith*, 101 S.Ct. 1873-74, n.9.

However, that is not what happened in the case *sub judice*. The testimony by Doctors Holbrook and Grigson does not suggest that the doctors' opinions about Petitioner's future dangerousness were based in any way on any statements which Petitioner made to them. Indeed, the testimony of both doctors was that Petitioner was wholly uncooperative and there is nothing in either doctor's testimony which refers to any statement that Petitioner made. The record reflects that, during the course of the pendency of the case against him, Petitioner attempted to slash his wrists at one time in the county jail. The record further reflects that, just as soon as the jury was seated in the case, Petitioner set some papers on fire on the counsel table and placed them on his head, setting his hair on fire. These actions are, of course, referred to by the psychiatrists in their testimony. Such testimony went to the psychiatrists' opinion that the Petitioner was really not insane but was just faking. It did not have anything to do with the issue of future dangerousness, which is the only thing that Petitioner complains about here. The prediction about future dangerousness made by each psychiatrist was based upon Petitioner's prior record and his actions, not upon his statements.

The psychiatric testimony as to future dangerousness is similar to that which was approved by the Supreme Court in *Barefoot v. Estelle,* — U.S. —, 103 S.Ct. 3383 (1983). The difference between *Barefoot* and this case is that in *Barefoot* the doctors did not actually examine the petitioner, whereas in this case they did. But in neither case is their testimony as to future dangerousness based upon statements made by the petitioner.

Neither is Petitioner accurate in his claim that the order by Judge Zimmerman, which granted the motion to suppress evidence, only related to actual words spoken by Petitioner and not to testimony based upon the substance of those words. The order appears in Volume VIII of the Statement of Facts, pages 2777-78, and it clearly excluded both statements made by Petitioner as well as any opinion which was based all or in part on any of such statements.

Indeed, Petitioner's argument appears to be the opposite of the one made in *Barefoot.* In that case, a complaint was made, 103 S.Ct. at 3399, that the psychiarists were permitted to testify without having actually examined the petitioner; here, Petitioner complains that the psychiatrists were permitted to examine him before they testified. It appears clear that the psychiatric testimony in this case was not based upon Petitioner's unwarned statements, but was based upon prior records as well as observations by the psychiatrists of Petitioner's actions and demeanor. To the extent that Petitioner's actions and demeanor were communicative acts, they were not testimonial in nature and were not protected by the Fifth Amendment. *See Smith,* 101 S.Ct. at 1873.

For the foregoing reasons the Findings and Conclusions of the Magistrate are ADOPTED as the Findings and Conclusions of the Court, and Petitioner's Objections are OVERRULED.

Judgment will be entered denying the relief requested.

SO ORDERED.

DATED: April 11, 1984.

/s/ Barefoot Sanders
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-79-0146-H

JESSIE RAY JONES

v.

DIRECTOR, TEXAS DEPARTMENT
OF CORRECTIONS

JUDGMENT

(Filed April 11, 1984)

The Court having heretofore entered its Findings in this case,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all relief requested be denied.

IT IS FURTHER ORDERED THAT the Clerk shall transmit a true copy of this Judgment, together with a true copy of the Findings of the Court, to the petitioner's counsel, Mr. Tom Mills, Esq., and to the respondent.

SIGNED AND ENTERED this 11 of April, 1984.

/s/ Barefoot Sanders
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1401

Summary Calendar

JESSIE RAY JONES,

Petitioner-Appellant

versus

O. L. McCOTTER, Director,
Texas Department of Corrections,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas

(July 18, 1985)

Before GEE, POLITZ, and JOHNSON, Circuit Judges.

PER CURIAM:

On January 15, 1974, William Cain was murdered in a convenience store robbery in Dallas, Texas. Later that year, Jessie Ray Jones, the petitioner herein, was tried, convicted, and sentenced to death for capital murder arising out of Cain's death.[1] On Appeal, the Texas Court of Criminal Appeals affirmed. Jones v. State, 568 S.W.2d 847 (Tex. Crim. App. 1978). The Supreme Court of the United States denied certiorari. Jones v. Texas, 439 U.S.

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1. A more detailed statement of the facts surrounding the instant case may be found in the opinion of the Texas Court of Criminal Appeals, Jones v. State, 568 S.W.2d 847 (Tex. Crim. App.) (en banc), *cert. denied*, 439 U.S. 959, 99 S. Ct. 363, 58 L. Ed. 2d 352 (1978).

959, 99 S. Ct. 363, 58 L. Ed. 2d 352 (1978). Jones' subsequent petitions for writ of habeas corpus were denied both in the state courts and in the federal district court. On appeal to this Court, Jones argues that the admission of psychiatric testimony at the punishment stage of his state court trial violated his rights under the Fifth, Sixth, and Fourteenth Amendments as interpreted in Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). *See also* Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982). Finding Jones' contention and the State's response controlled by Smith and this Court's recent decision in Muniz v. Procunier, No. 84-1791 (5th Cir. May 9, 1985), we hold that Jones' Fifth Amendment rights, as enunciated in Smith, were indeed violated by the admission of psychiatric testimony at the punishment stage. The judgment of the district court denying the writ of habeas corpus is reversed and the case is remanded for relief consistent with this opinion.

I. DISCUSSION

Jones was arrested on February 6, 1974. At the punishment stage of his trial,[2] the prosecution introduced the

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2. Texas employs a bifurcated proceeding in capital murder cases—a guilt phase and a penalty phase. If the defendant is found guilty, a separate proceeding before the same jury is held to fix punishment. At the penalty phase, if the jury affirmatively answers three questions on which the State bears the burden of proof beyond a reasonable doubt, the judge must impose the death sentence. Tex. Code Crim. Proc. Ann. art. 37.071(a) (Vernon 1981). *See also* Estelle v. Smith, 451 U.S. at 457-58 & n.2, 101 S. Ct. at 1870 & n.2.

testimony of Dr. James Grigson and Dr. John Holbrook. Both Drs. Grigson and Holbrook examined Jones twice before the punishment stage of the trial,[3] and both concluded from these examinations and Jones' history that he was a sociopath and therefore would continue to be a future danger to society. *See* Tex. Code Crim. Proc. Ann. art. 37.0171 (b) (2) (Vernon 1981) (jury in capital murder case must determine in order to impose the death sentence "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). At trial, the state court trial judge apparently recognized that admission of the psychiatrists' testimony endangered Jones' Fifth Amendment rights against self-incrimination. Accordingly, the trial judge, in response to a defense motion to suppress entirely both doctors' testimony on Fifth Amendment grounds, suppressed only that testimony from the psychiatrists (1) as to the contents of any conversation that they had with Jones while he was in custody and (2) any opinions by the psychiatrists based on a conversation regarding the facts of the case against Jones. State Trial Record Vol. VIII at 2777-78. As a result of the jury's findings—including an affirmative finding that Jones would probably commit future criminal acts of violence that would constitute con-

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3. Dr. Grigson, who has testified for the prosecution in several reported cases, first examined Jones on March 14, 1974. On May 9, 1974, Jones filed a motion to determine competency to stand trial and sanity at the time of the offense. On that same date, Jones requested a trial on the issue of competency and was examined by Dr. Holbrook. On May 16, 1974, Jones was found competent to stand trial. On May 30, 1974, Jones was again examined by Dr. Holbrook and on June 4, 1974, he was again examined by Dr. Grigson.

tinuing threats to society—Jones was sentenced to death. Jones presented no evidence at either the guilt or punishment determination stages of the trial.

In Estelle v. Smith, the Supreme Court, affirming this Court, held that "both the Fifth and Sixth Amendments are violated by a doctor's testimony on future dangerousness of the defendant when the opinion is based on questioning conducted without a prior warning on the Fifth Amendment privilege and without opportunity for advice of counsel." Muniz, op. at 2.[4] While the federal district court held that Estelle v. Smith does not apply to the instant case on the basis that the doctors' testimony was not based on facts communicated to them by Jones, the State has since abandoned its argument that the communications between the doctors and Jones were non-testimonial in nature. *See* Gholson,, *supra.* The State now rests solely on its argument that Estelle v. Smith, which was decided after the punishment stage in Jones' trial, should not be applied retroactively. This contention, however, has been rejected both by this Court, *see* Muniz, and by the Texas Court of Criminal Appeals, *see* Ex parte Chambers, 688 S.W.2d 483 (Tex. Crim. App. 1984) (en banc), *petition for cert. filed,* 53 U.S.L.W. 3854 (June 4,

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4. Although the State appears to have conceded the point in a later motion, see n.5 *infra,* the State in its initial brief contended that Jones had failed to demonstrate that he did not receive Miranda warnings. Even assuming that the State has not conceded this argument, we find the State's argument that Jones voluntarily waived his right against self-incrimination unpersuasive in light of the record. See Battie, 655 F.2d at 703 n.24; Gholson, 675 F.2d at 739 n.4.

1985).[5] Accordingly, we are bound by Muniz and must reject the State's response and hold that Jones' Fifth Amendment rights as enunciated in Smith were violated by the introduction of the psychiatric testimoy.[6]

II. CONCLUSION

The judgment of the district court is reversed. The case is remanded to that court with directions to grant relief in accordance with this opinion.

REVERSED AND REMANDED

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5. The State of Texas has petitioned the Supreme Court of the United States for a writ of certiorari in Chambers. The State moved this Court to stay proceedings in the instant case pending the outcome of the Supreme Court's action on the State's Chambers petition. In this motion, the State conceded its remaining contentions. In particular, the State related:

> Respondent's second argument to this Court that no fifth amendment violation occurred because the communications between the examining psychiarist and the defendant were non-testimonial in nature is abandoned. After further reflection, Respondent concludes that this argument was dispositively decided against the state in Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982). Gholson had not been decided at the time Respondent originally advanced the non-testimonial argument in the district court. This Court, however, is bound by Gholson.
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> To summarize Respondent's position, unless the Supreme Court reverses Chambers on the ground that Estelle v. Smith error should not be applied retroactively, resolution of Jones is controlled by Muniz. Respondent requests the Court stay further proceedings in Jones until the Supreme Court has acted on the state's request for certiorari in Chambers.

Upon consideration, this Court denied the State's motion for a stay pending the outcome of the petition for certiorari in Chambers.

6. Since we hold that Jones' Fifth Amendment rights were violated, we need not reach the issue of whether Jones' Sixth Amendment right to counsel was violated. *See* Battie, 655 F.2d at 694 n.2. We also do not reach Jones' second ground for relief of prosecutorial misconduct in argument during the penalty phase.